NO. 20517

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AARON HODGE, aka
CHICK DE LEO

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant Aaron Hodge to be guilty as charged in a one-count indictment, following trial by jury. (C.T. 5)[1]

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

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[1] "C.T." means Clerk's Transcript.

II.

STATEMENT OF THE CASE

Appellant was charged in a one-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The one-count indictment alleged that appellant knowingly and intentionally transported a stolen 1962 Chevrolet Station Wagon in foreign commerce from Los Alamitos, California through the Southern Division of the Southern District of California to Tijuana, Baja California, Mexico, and further alleging that at the time appellant knew said motor vehicle to be stolen. (C.T. 2).

Jury Trial of appellant commenced on March 23, 1965 before United States District Judge James M. Carter (C.T. 4,5). Appellant waived his right to counsel and proceeded in pro per. James Curto was appointed to assist appellant. (3/16 R.T. 1, 4).[2/] Appellant was found guilty as charged in the one-count indictment on the same date, March 23, 1965. (C.T. 5).

Thereafter on April 12, 1965, appellant was committed to the custody of the Attorney General for the maximum period of five years for a study in Title 18, United States Code, Section 4208 (c). (C.T. 7).

After the study was completed appellant was returned to the Court on August 9, 1965, and the sentence was reduced to four years pursuant to Title 18, United States Code, Section 4208 (a) (2).

[2/] "3/16 R.T." means Supplemental Reporter's Transcript of March 16, 1965.

Appellant subsequently, on August 16, 1965, filed a Notice of Appeal (C.T. 11-12).

III.

ERROR SPECIFIED

The errors specified by appellant are paraphrased as follows:

A. Plain error is alleged.

B. Appellant didn't effectively waive counsel.

C. The conduct of the trial allegedly shows incompetence to waive counsel.

D. Appointment of counsel in an advisory capacity was insufficient.

E. Fourth Amendment applies to searches and seizures by Mexican officers in Mexico.

F. Statements to United States Officers in Mexico were fruit from the poisoned tree.

G. Statements by appellant concerning other crimes should not have been admitted.

IV.

STATEMENT OF THE FACTS

Mrs. Naomi Earl Rook parked her 1962 Chevrolet Station Wagon, bearing California License LTB-114, in front of the Food Giant grocery store at about 3:00 P.M. on January 13, 1965. (R.T. 9, 10, 13).[3/]

[3/] "R.T." means Reporter's Transcript.

She left the keys in the car and when she returned at 3:30 P.M. her car was gone (R.T. 13). She didn't know the appellant and didn't give him permission to take her car. (R.T. 12).

Appellant was then found in Tijuana the same evening (January 13, 1965) trying to sell the automobile for $200.00, then later $100.00. (R.T. 21-23, 29). He said the car was "hot stuff". (R.T. 21).

The guitar player at the Lido Bar, Jose Guadalupe Cortes, and a client of his rode with appellant to the La Welta Cafe in the 1962 Chevrolet Station Wagon. (R.T. 22).

Jose Anaya and Tamayo, two Mexican police officers, and a Liaison Officer from the San Diego Police Department came to the La Welta Cafe. (R.T. 36, 37, 39, 47). This was about 8:00 P.M. (R.T. 51). The officers had information that someone there "was trying to sell a car very cheap because it was a stolen car." A set of keys was taken from the right hand side pocket of appellant's trousers and the officers found they fit the 1962 Chevrolet Station Wagon. (R.T. 53).

Appellant told officer Trevino of the San Diego Police Department that two colored gentlemen, whom he had met while hitchhiking, were to pay him $25.00 to sell the car and that they were directly across the street in a red 1955 Chevrolet (R.T. 55, 56) and that he had lived in Los Alamitos where the car was stolen from (R.T. 59).

No car was found that answered the description (R.T. 60), and no negroes were found in the area (R.T. 38, 46, 73).

Appellant testified he was merely trying to find a person in Mexico who would loan $200.00 on the car for $25.00 interest (R.T. 67). Appellant also testified "He told me he didn't have the pink slip to the car, but showed me a notarized bill of sale with a California seal on it...."

Appellant didn't tell Luis Munoz, Special Agent, Federal Bureau of Investigation, anything about a loan but rather said "he had been offered twenty-five dollars to help these two individuals sell the automobile in Tijuana." (R.T. 77).

Appellant admits to having served in a reformatory in Minnesota in 1959, and further admitted he had been convicted of a misdemeanor when he signed a pink slip wrong. (R.T. 69).

Appellant's first cousin, who was familiar with appellant's reputation for truth and veracity, testified his reputation was "bad". (R.T. 80-81).

Appellant waived his right to have an attorney, but Judge Carter appointed James Curto to sit at counsel table for assistance and advice. (3/16 R.T. 3-4).

V

ARGUMENT

A. THERE IS NO PLAIN ERROR.

Appellant admits that none of the specified errors was brought to the attention of the trial Court. (A.B. 20).[3]

The conviction should not therefore be reversed unless there is plain

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[3] "A. B." refers to Appellant's Brief.

error.

Though clearly within the power of this Court, finding of plain error is a "power rarely exercised" in this Circuit.

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States, 287 F.2d 125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule have been taken in other circuits.

Johnson v. United States, 291 F.2d 150 (8tn Cir. 1961)

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)

Examination of the issues shows clearly that there is no plain error in this case.

B. APPELLANT EFFECTIVELY WAIVED COUNSEL.

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." However, the Constitution does not require that an attorney be forced upon the defendant.

Carter v. Illinois, 329 U. S. 173, 174-5 (1946).

The right can be waived by a defendant, if the waiver is made competently and intelligently.

Johnson v. Zerbst, 304 U. S. 458 (1937)

The responsibility for the determination of whether or not there is a competent and intelligent waiver of the right to counsel rests with the trial judge.

See Johnson, supra, at 465.

Whether there has been an intelligent waiver depends in each case upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused.

Johnson, supra at 464.

Appellant relies upon the case of Von Moltke v. Gillies, 332 U. S. 708, 724 (1948), to support his contention that he did not intelligently waive his right to counsel in this case. The facts in Von Moltke would seem to distinguish it from this appeal, and render it inadequate precedent for appellant's contention. Von Moltke is an extreme case. The defendant was a resident alien, arrested for conspiracy to violate the 1917 Espionage Act and punishable by death. She signed a written waiver of counsel after a five minute summary proceeding before a judge unfamiliar with the facts of the case. It is no surprise that she was found to have made no valid waiver.

It is quite evident from the record in the instant case that the appellant suffered no similar disabilities and was well able to make the intelligent waiver required by law. To begin with, the cases are patently different in that appellant was represented by counsel in all pre-trial proceedings. Then on March 16, 1965, a hearing was held before Judge Kunzel to discuss appellant's request for a waiver of counsel.

At that hearing the appellant stated,

"Due to some circumstances that have come up in the case, I would like to fight it myself . . . . I feel that I have a better

chance there than an attorney that don't know the circumstances of the witnesses . . . ." (3/16 R. T. 6).[4/]

The court then questioned appellant as to whether he felt competent to handle his case, whether he understood procedures, and whether he knew how to select a jury. Appellant's responses indicated at least a familiarity beyond that of the average layman. (3/16 R. T. 6).

Appellant insisted on his right to conduct his own defense, even though he was warned three times by the court that he was making a mistake and would be operating at a distinct disadvantage. (3/16 R. T. 7-8).

Unable to convince appellant of the difficulties involved in making his own defense, the court then appointed Mr. Curto as defendant's counsel in an advisory capacity. Throughout the trial, competent counsel was present at the defense table, ready to consult with and advise the appellant should he have any difficulties. Appellant admits shortly before the commencement of the trial, appellant was once again advised of his right to confer with the appointed counsel at any time. (3/16 R. T. 5).

Just before the commencement of trial, Judge Carter gave appellant a final admonition in these words:

> "One thing more before you leave. I am not going to lead you by the hand, here - - I am not going to try the case. You were given a chance to have a lawyer. You are going to have a lawyer to talk to. If you get in trouble, you are going to have to bail yourself

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[4/] "3/16 R.T." refers to Supplemental Reporter's Transcript of March 16.

out. I can't be your lawyer, and the judge too." (3/16 R.T. 6). The Court did however intervene in appellant's behalf (R.T. 36).

Despite the admonitions of the Court, and its extensive questioning of appellant, this appeal contends there was no valid waiver, because there was no lengthy discussion of penalties, possible defenses, limitations on admissible evidence, etc., by the Court.

In one case it was said:

> "Nor is it the duty of the trial court judge to explain and set out for an accused the possible defenses he might adduce to the charges against him. If an accused were represented by counsel, it most obviously is not the duty nor the privilege of the judge to suggest or explain possible defenses in behalf of accused. And upon finding a competent, intelligent and intentional waiver of counsel, it is not then any the more the duty of the trial judge to advise an accused respecting possible defenses . . . .[I]t is not the duty or the responsibility of the trial judge to give legal advice to an accused, or to any party in any federal proceeding."
>
> Michener v. United States, 181 F.2d 911 at 918 (8th Cir. 1950)

The cases seem to find the waiver of counsel as valid where the trial court, as here, extensively reviewed the consequences of a propia persona defense for the defendant.

Williams v. Swope, 186 F.2d 897 (9th Cir. 1951).

O'Keith v. Johnston, 129 F.2d 889 (9th Cir. 1942).

United States v. Redfield, 197 F.Supp. 559 (D.C. Nev. 1961).

To the contrary, it appears that an invalid waiver of counsel is only found in extreme cases such as Von Moltke, supra, where the record gives no indication of a voluntary waiver.

An example of a competent and intelligent waiver which was recently upheld is found in the case of Heine v. United States, 363 F.2d 756 (5th Cir. 1966). In Heine, the valid waiver merely consisted of the defendant answering "No, sir" three times when asked by the trial court if he desired counsel, after he had been advised of his rights and the consequences of defending himself.

Two experienced judges here found a valid waiver.

C. CONDUCT OF THE TRIAL SHOWS APPELLANT'S COMPETENCE TO WAIVE COUNSEL.

It is true, as alleged by appellant, that in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.

Appellant, however, without citation of any authority, attempts to extend this truism far beyond its logical bounds. It is alleged that since he did not make proper and timely objections at trial in his own defense, the court should have taken upon itself the obligation to raise these objections and defenses in appellant's behalf. It is submitted that this view is not in keeping with a trial court's proper function, and is contrary to existing case law.

> "When appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. It cannot be said that court denied him representation of counsel, or denied him a fair trial, because the judge refrained from intermeddling."
>
> Burstein v. United States, 178 F.2d 665 (9th Cir. 1949).

To the same effect is the following language in Smith v. United States, 216 F.2d 724 at 727 (5th Cir. 1954).

> "The fact that timely objection was not made on the trial is one of the risks the accused assumed when he undertook to defend himself, and we cannot now for the first time find that the trial court committed error in its proceedings when such alleged error was not called to the court's attention in time for corrective measures to be taken at the trial . . . .
>
> "Once it is found, however, that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which he presumably sought to obtain therefrom . . . ."

An accused has an unquestioned statutory right to defend himself, as long as he makes his wishes known prior to trial. Title 28, United States Code, Section 1654.

See: Duke v. United States, 255 F.2d 721 (9th Cir. 1958).

United States v. Denno, 348 F. 2d 12 (2nd Cir. 1965)

Courts are jealous of the right of a defendant to be represented by counsel, but a defendant can waive this right and should not be heard to complain when he knowingly and designedly does so.

Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962).

The record is replete with evidence that appellant conducted his defense very ably for one possessed of only a layman's knowledge of the law. There is no indication that appellant was lacking in intelligence, nor that he was "manifestly not competent" to conduct his defense as alleged, nor that he was guided "more by force of ego than intelligence." It is true that his actions at times were lacking in technical nicety, but it is submitted that this is typical of propia persona proceedings.

Appellant objected during the trial at least 8 times and some of the objections were sustained (R. T. 36). He excused two jurors while the government excused only one (3/23 R.T. 13, 14). Appellant wanted the jury polled. (R. T. 120).

Appellant exhibited a surprising ability to convey his thoughts in legal language throughout the trial, an ability which belies his present claim of incompetence. His closing argument (R. T. pgs. 93-95) provides some very good examples. In that argument he discussed the fact that the prosecution must prove his guilt beyond a reasonable doubt (R. T. 93), indicated that all essential elements of the crime must be proved (R. T. 93-94), defined

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5/ "3/23 R. T." refers to Supplemental Reporter's Transcript of March 23, 1965.

"commerce" and "stolen" as found in the Dyer Act (R. T. 95), pointed out that the prosecutor has the right of rebuttal (R. T. 94), quoted the applicable statute (R. T. 95), and pointed out where he believed his conduct varied from that required to find an offense (R. T. 95). He set forth his defense in clear and and concise terms.

It should also be noted that appellant's cross-examination of witnesses, decried as inept in his brief, was in almost all cases as extensive as the government's direct examination.

He also called a witness in his behalf (R. T. 70).

D. APPOINTMENT OF COUNSEL IN AN ADVISORY CAPACITY WAS SUFFICIENT.

It is obvious from the record that the trial court wanted appellant to have the assistance of counsel, both for his benefit, and to insure the orderly progress of the trial. When appellant unequivocably announced his intention to conduct his own defense, Mr. Curto, an established and competent counsel (3/16 R.T. 7) was appointed to advise appellant, and appellant was encouraged to consult with him whenever necessary.

This procedure was approved by the court in United States v. Cantor, 217 F. 2d 536 (2nd Cir. 1954).

This was the only balance the trial court could find to aid in walking the legal tight-rope it was confronted with.

Appellant makes much of the fact that the record only indicates two instances where he consulted with Mr. Curto, although it is admitted that other,

non-recorded, consultations may have occurred. It is also alleged that the absence of sustained objections is indicative of Mr. Curto's ineffective counseling. However, during the course of a brief trial, appellant did raise at least eight objections, and it is submitted that an equally valid hypothesis for the absence of further objection was the lack of valid points on which to base an objection.

E. THE FOURTH AMENDMENT DOES NOT APPLY TO MEXICAN OFFICERS IN MEXICO.

Appellant was arrested by Mexican officers presumably for violation of Mexican law.

Appellant admits that Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965) cert. den. 382 U. S. 963, reh. den. 383 U. S. 923, 2nd mot. reh. den. 384 U. S. 914) holds against him. (A. B. 32).

At page 782 of the Birdsell case, the following language is found:

> "that the United States is bound by its Bill of Rights wherever it acts, is inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American Officials were present and cooperated in some degree."

The pertinent facts of Birdsell are identical with the case at hand. In both cases a local officer was requested by Mexican authorities to accompany Mexican officers to interpret (R. T.51). No United States Federal officers were present in either case at the time of the search and seizure. (R. T. 54).

"fruit from the poisoned tree."

G. STATEMENTS BY APPELLANT CONCERNING OTHER CRIMES WERE ADMISSIBLE.

Appellant claimed during the trial that he had no felony conviction, but only a juvenile conviction (R. T. 69).

Appellant is 26 years of age (R. T. 125). The conviction complained of was in 1959 (R. T. 69). This would make his conviction at about age 20. This is consistent with his statement "I have done four years in a penitentiary with adults . . . ." (R. T. 126).

Impeachment of defendants who choose to testify by prior felony convictions is clearly permissible.

See: Federal Jury Practice and Instructions, Mathes & Devitt, nos. 9.08 and 9.09 at page 117 and cases cited there.

Prior similar acts and convictions are admissible on the issue of intent and knowledge.

See: Federal Jury Practice and Instructions, nos. 10.07 and 10.08 at page 127 to 130 and cases there.

In this case, the facts elicited are also probative to show that appellant knew "pink slips" were required in transferring title to automobiles registered in California.

Appellant was asked if he "hadn't been convicted of stealing a Ford pick-up." In his usual "glibness" he came up with the story that he had merely signed the "pink slip" wrong (R. T. 70).

Another case where the facts are different but the same Constitutional issue was raised and decided favorable to the Government was United States of America v. Stonehill , 254 F. Supp. 1003 (D.C. N.Y. 1966).

In that case documents that were admittedly seized illegally by the Philippine Government in Manila, and were later admitted against Stonehill in the New York District Court, where the facts showed the United States Government had not participated to any degree in the illegal search and seizure.

The purpose of the Fourth Amendment was to discourage misuse of powers by officers of the United States.
See language in Byars v. United States, 273 U. S. 28, 33.

It can be readily seen the purpose is not, therefore, to regulate the manner in which foreign governments enforce their own laws within their own boundaries.

No United States officer was present. Officer Trevino, San Diego Police Department liaison officer assisted only as an interpreter. (R. T. 54).

Appellant spoke no Spanish and the Mexican officer spoke no English. San Diego Police Officer Trevino made it clear he had no power in Mexico and was only there as a visitor at their request and appellant was their prisoner, not his. (R.T. 55, 61, 62, 74).

F. STATEMENTS TO OFFICERS TREVINO AND MUNOZ WERE NOT FRUIT FROM THE POISONED TREE.

For the reasons previously stated, there was no illegal search and seizure by the Mexican officers. It must, therefore, follow there is no

The testimony of his witness, Claude Owen Crawford, on the issue, was favorable to appellant.

As said before, no objection was made and no plain error resulted.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott
SHELBY R. GOTT